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THE RELIGIOUS LAWYER IN A PLURALIST SOCIETY*

Howard Lesnick**

A Tennessee attorney, described as “routinely” practicing before the Juvenile Court, inquired of the Supreme Court’s Board of Professional Responsibility what his obligations were as appointed counsel to a minor who had asked the court, pursuant to State law, to waive the statutory prohibition of abortion without parental consent.¹ He had apparently been appointed to represent minors in such circumstances on more than one occasion, but he considered himself “a devout Catholic [who] cannot, under any circumstances, advocate a point of view ultimately resulting in what he considers to be the loss of human life.”² The attorney posed to the Board a half-dozen questions, of which two are salient to my current subject: “[S]hould the appointed counsel advise the minor seeking an abortion about alternatives and/or advise her to speak with her parents or legal guardian about the potential abortion,” and “can the appointed attorney decline to accept the appointment for moral [or] religious . . . reasons?”³

In responding to the first question, the Board noted the obligation of counsel to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions.”⁴ It apparently saw an

* I dedicate this essay to Tom Shaffer, whose work has placed me (like many others) enduringly in his debt.

This essay is a revised version of one presented at a conference on *The Relevance of Religion to a Lawyer’s Work*, held at Fordham University School of Law on June 1-3, 1997. I have benefited from the responses of Milner Ball, Robert Burt, Teresa Stanton Collett, Sherman Cohn, Geoffrey Hazard, Jack Healey, Seth Kreimer, Alice Lesnick, Samuel Levine, Carrie Menkel-Meadow, Russell Pearce, Jack Sammons, and the participants in a session of Georgetown University Law Center’s Law and Society Workshop. I have drawn here-and-there on portions of a book manuscript of mine, *Listening for God: Religion and Moral Discernment* (forthcoming 1998).

Unless otherwise noted, scriptural translations are from the New Revised Standard Version (1989). Because of the vast number of translations now in print, I have felt free to substitute a word or phrase from another version at times.

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1. See Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Op. 96-F-140 (1996) [hereinafter Formal Op. 96-F-140]. The Tennessee law in question provides: “If . . . the minor elects not to seek consent of the parent or legal guardian whose consent is required, then the minor may petition, on the minor’s own behalf, or by next friend, the juvenile court of any county of this state for a waiver of the consent requirement” Tenn. Code Ann. § 37-10-303(b) (Supp. 1997).

2. Formal Op. 96-F-140, *supra* note 1.

3. *Id.* The omitted language referred to “malpractice insurance” concerns as an additional reason.

4. *Id.* Tennessee is a “Code” State, that is, one in which the Model Code of Professional Responsibility (1969) [hereinafter Model Code], rather than the Model Rules of Professional Conduct (1983) [hereinafter Model Rules], is in force. However, the language quoted did not appear in the Model Code, *supra*, promulgated by

unstated "only" in this requirement, for it held that "[i]f the minor is truly mature and well-informed enough to go forward and make the decision on her own, then counsel's hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation under [Model Code Disciplinary Rule] 7-101(A)(4)(a) and (c)."⁵

Beyond that, the Board looked to the requirement of "undivided loyalty" and the admonition that counsel not allow "any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment." This principle, the Board reasoned, would be "called into question" should counsel "strongly recommend[] that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice."⁶

The attorney apparently based his suggestion that he be allowed to decline the appointment on the language of the professional code, asserting that his "religious beliefs are so compelling that [he] fears his own personal interests will subject him to conflicting interests and impair his independent professional judgment." The Board turned this aside on the ground that "religious and moral beliefs [even if] clearly fervently held," are not the sort of "compelling reasons" that the Code or judicial rulings have in mind as a permitted ground for withdrawal from the representation of a person unable to retain counsel.⁷ Characterizing the claim as one "akin to that of a conscientious objec-

the American Bar Association in 1969, but was nevertheless adopted into the Tennessee Code from the Model Rules, *supra*, Rule 1.4(b).

The Board preliminarily observed that, under local law, an appointed attorney "represents only the minor," that is, acts as an advocate rather than a guardian. *See* Formal Op. 96-F-140, *supra* note 1.

5. Formal Op. 96-F-140, *supra* note 1. It may be that the Board's language reflected the substantive criterion by which a judge is to decide whether to grant the waiver. The statute provides that the consent requirement "shall be waived if the court finds either that: (1) The minor is mature and well-informed enough to make the abortion decision on the minor's own; or (2) the performance of the abortion would be in the minor's best interests." Tenn. Code. Ann. § 37-10-304(e) (1996).

6. Formal Op. 96-F-140, *supra* note 1.

7. *Id.* The Board quoted the second sentence of the Model Code, *supra* note 4, EC 2-29, which in its entirety reads:

When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

Id. (citations omitted).

The cases relied on dealt with attorneys held in contempt for refusing judicial appointment in criminal cases. According to the Board, they stand substantively for the proposition that distaste for the offense charged, like unpopularity of the defendant, would not excuse failure to accept appointment. *See* Formal Op. 96-F-140, *supra* note 1.

tor," the Board found no constitutional objection. Although it noted Tennessee case law giving an attorney that desires relief from an unwelcome appointment the right to a hearing "to develop an adequate record" before the appointing judge, the Board seemed to encourage the denial of a claim based on "conflict between the ethical and moral beliefs of counsel and those of his client,"⁸ quoting from an earlier Formal Opinion holding that "counsel's moral beliefs and [usual] ethical standards and duties must yield to the moral beliefs and legal rights of the defendant."⁹

The problem is surely not an easy one. Yet, I find every aspect of this opinion troubling, and the transaction that gave rise to it—the judge's initial decision to make the appointment—no less so. The analysis evidences a wooden and impoverished view of the lawyer's counseling function, a failing that has, I believe, more connection with my topic than might first appear; specifically, it denies, by wholly failing to see, a spiritual dimension of the counseling relation. More fundamentally, it manifests an inhospitability to the "personal" norms of individual lawyers that I can most accurately describe as statist. It sees the pluralist quality of our society as calling on the lawyer to accommodate his or her religion to the official norms of the legal profession, rather than the reverse.

I will argue that such a stance is grievously wrong. Its failing is not that it is especially hostile to religiously grounded norms; it regards them (like other sincerely and strongly held moral claims) as purely personal matters, of no great public import. I believe, on the contrary, that a pluralist society should celebrate and make reasonable space for the strongly held moral beliefs of its lawyers (and others), in the name of the collective and not merely the individual good. In seeking to justify this belief, I will focus on, but will not be able to limit myself to, those moral claims that are grounded in "religion."

I need to begin by clarifying what I mean when I speak of a religious lawyer. I will then address the significance of the fact that he or she carries on the profession of law in a pluralist society.¹⁰

8. Formal Op. 96-F-140, *supra* note 1.

9. *Id.* (quoting Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Op. 84-F-73 (1984)).

10. In personal correspondence, Professor Jack Sammons has questioned my willingness to accept the Board's Opinion as an accurate expression of the prevailing norms of the profession. Rather than taking issue with the Board on grounds that I present as largely external to those norms, he would have preferred that I explore the resources for criticism that exist "within the practice." His article, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. Ark. Little Rock L.J. 1 (1995), is a challenging articulation of a broader conception of "the practice." See especially the concluding sections, *id.* at 34-67.

I. THE RELIGIOUS LAWYER

Were we to gather in one room a number of those who may be thought (by themselves or others) to be religious lawyers, we would find ourselves among a company whose diversity would be as broad as its commonality. One might approach the question of describing such a group by identifying the ways in which they differ or the ways in which they are alike. You may know the old line that there are two kinds of people in the world: those who think of any question by dividing it into two or more parts and those who do not. Whether that account goes so far as to question whether the second category really exists, examples of "first category" approaches in law abound. In a celebrated article, Sandy Levinson has identified five senses in which one might be a "Jewish lawyer," all but one of which at least arguably manifest religious and not merely ethnic or cultural Judaism;¹¹ Russ Pearce promptly added a sixth.¹² Joseph Allegritti sees four variant ways in which a Christian lawyer might approach his or her engagement with the norms of the professional codes,¹³ and although they mainly reflect differing views of the codes (or the world of law and lawyers to which they relate), I believe that they also embody differing understandings of Christianity as well. Michael Perry, writing about universities rather than the practice of law, identifies—in ways not without relevance to law practice—two fundamentally differing apprehensions of the significance of a university's being Roman Catholic.¹⁴

I place myself firmly within the second category. Instead of contributing my own taxonomy of religious lawyers, I will seek here to articulate the qualities that I believe virtually all religious perspectives share, across as well as within sectarian boundaries. Please understand that I am not seeking to supply a definition of religion.¹⁵ My

11. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577 (1993).

12. See Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 Cardozo L. Rev. 1613, 1616 (1993).

13. See Joseph G. Allegritti, *The Lawyer's Calling: Christian Faith and Legal Practice* 7-24 (1996) [hereinafter Allegritti, *The Lawyer's Calling*]; Joseph Allegritti, *Christ and the Code: The Dilemma of the Christian Lawyer*, 34 Cath. Law. 131 (1988).

14. See Michael J. Perry, *The Idea of a Catholic University*, 78 Marq. L. Rev. 325 (1995); see also Lynn R. Buzzard, *Vocation, Work and Calling: A Discipleship Study* 35 (1985) (describing three "rationales or bases . . . for Christians serving in politics or law").

15. I tend to share Kent Greenawalt's belief that "[n]o specification of essential conditions will capture all and only the beliefs, practices, and organizations that are regarded as religious in modern culture and should be treated as such under the Constitution." Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 763 (1984). But even if one could establish that Greenawalt has overstated the matter, the effort to make an "if and only if" specification of the qualities that make one "religious" is, for reasons given in the text immediately following, simply not a useful one for present purposes.

An "essential conditions" approach seeks to define religion in terms of "either a single feature necessary and sufficient, or else a conjunction of simple features (A and

objective is to lay a foundation for discerning what the stance of our society should be toward religiously grounded priorities in law practice, and the argument that I will set out to make is more normative than doctrinal. My aim in the present section is to describe accurately the core qualities that religious lawyers share, in the belief that such a description will inform our answer to the question: To what extent should the norms of professional responsibility view hospitably the desire of individual lawyers to carry on their law practice in ways that are consonant with their religiously grounded priorities? A response to that question is incomplete, however, unless it encompasses the further one: To what extent should a lawyer refrain from making practice decisions that fully implement his or her religiously grounded priorities?

There are, I suggest, three themes within which the qualities that we call religious may usefully be described. I will speak of them as *obligation*, *integration*, and *transcendence*.

A. *Obligation*

Robert Cover grounds an essay whose brevity belies its depth and influence in this thought: "The basic word of Judaism is obligation" ¹⁶ My experience is that the sentence holds true across a broad spectrum of religious traditions. It has often been observed that the words, religion and obligation, have a common Latin root, *ligare*, to bind. For many, believers and skeptics alike, religion is the principal ground of obligation. Indeed, many would assert, with Dostoyevsky's Ivan Karamazov, "if there is no God, then everything is permitted," ¹⁷ and, although the differences among and within religions over what is and is not permitted are significant, there is agreement that to posit "God" is to posit obligation channeling choice.

The traditional means by which religion has reinforced our will to do God's will is through the conception of God as Supreme Being, the King of the King of Kings, the Unmoved Mover, who constituted morality by "His Word" and dispenses rewards to the faithful and punishment to the disobedient. This "divine command" view of the relation

B and C and . . .) that is necessary and sufficient for the application of [the] term." *Id.* at 763 n.46. For Greenawalt's argument against such an approach, see *id.* at 763-67.

The anthropologist Clifford Geertz, referring specifically to religion, writes of his preference for a "definitional procedure of a more inductive sort." Clifford Geertz, *Islam Observed: Religious Development in Morocco and Indonesia* 96 (1968). His effort is to describe not a "universal property" that has "Cartesian sharpness, but . . . a system of concepts that can sum up a set of inexact . . . yet genuine similarities." *Id.* at 96-97.

16. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & Religion 65, 66 (1987). The quoted sentence ends, "obligation or mitzvah." *Id.* The latter word "literally means commandment but has a general meaning closer to 'incumbent obligation.'" *Id.* at 65.

17. Fyodor Dostoyevsky, *The Brothers Karamozov* 789 (Constance Garnett trans., Random House 1950) (1880).

between divinity and humanity is today tenaciously embraced by segments of orthodoxy in all branches of the Abrahamic tradition, at the same time as it is widely rejected by many who deem themselves believers, theologians and others. It does not minimize the importance of the difference between these approaches to religion to recognize that each has power to ground a moral life, and that each does its work by generating a sense—albeit a significantly different sense—of obligation.

“If the Lord is my Master, to no man am I a slave.” This cry of seventeenth century English radicals dramatically expresses the way in which fidelity to the commands of the One True Ruler has served to embolden those who would resist the tyranny of fellow mortals. Through the ages, the immortalized and the unremembered alike have found the strength to question the idolatrous insistence of the powerful on absolute obedience to them in the idea given voice by Sophocles with a simplicity and eloquence unmatched in 2500 years:

CREON: But tell me thou—and let thy speech be brief—The edict hadst thou heard, which this forbade?

ANTIGONE: I could not choose but hear what all men heard.

CREON: And didst thou dare to disobey the law?

ANTIGONE: Nowise from Zeus, methought, this edict came, Nor Justice, that abides among the gods.
In Hades, who ordained these laws for men.¹⁸

Modern theology, prompted in many cases by feminist insights, has done us important service in questioning the traditional conception of divine law as an edict from Olympus.¹⁹ It in no way minimizes our recognition of that service for us to recognize as well the two-edged quality of even the most traditional, patriarchal/hierarchical image of divinity. Rabbi Nancy Fuchs-Kreimer recounts a powerful experience, in reflecting on the continuing, contested use in Jewish liturgy of the word, *melekh*, usually translated as “king” (or, now at times, the neuter, “ruler”), in the traditional Jewish blessing said on many occasions throughout the day.²⁰ In German, the Hebrew word is sometimes translated as *fuehrer*, which was the title by which Adolph Hitler chose to be known, and she tells of a group of German Christians who, at great personal cost, responded to the command to

18. Sophocles, *Antigone*, in *Anthology of Greek Drama* 101, 115 (Charles Alexander Robinson, Jr. ed., 1963) (442 B.C.E.).

19. Antigone's response goes on to describe this conception in graphic terms:

Nor did deem *thine* edicts of such force
That they, a mortal's bidding, should o'erride
Unwritten laws, eternal in the heavens.
Not of to-day or yesterday are these,
But live from everlasting”

Id.

20. Nancy Fuchs-Kreimer, *God as “Fuehrer,” Reconstructionism Today*, Autumn 1993, at 13.

acknowledge the decrees of *der Fuehrer* in these words: "We will not obey Hitler. We already know who *our* Fuehrer is."²¹ She goes on to remind us of a Jewish prayer, the *aleinu*, which has closed all Jewish services since the fourteenth Century. Its central passage begins (in the standard English translation): "We bow the head and bend the knee before the King, the King of Kings, the Holy One, Blessed be He." The meaning of the prayer has been described in these terms: "We worship no earthly power. Only to the only King do we bow and kneel, as a sign of ultimate loyalty to Him alone, and awareness of our mortality."²²

There is at work here something deeper than simply an instrumental means of strengthening the will to act morally by positing a supernatural sovereign that trumps worldly incentives to do otherwise. The kingship imagery is, I believe, a metaphorical portrayal, in readily recognizable strokes, of a profound response to the experience of awe and wonder, that sense of the sacred embedded in the mundane, that, I will suggest below, is at the heart of the religious consciousness. That experience generates an imperative, in religious terms a "call" or a "leading" to act, and the language of divine sovereignty serves to crystallize that feeling of being impelled, to keep its force in place in our consciousness, notwithstanding the inevitable ebbing of the immediate experience itself. In the anthropologist Clifford Geertz' felicitous terms, a "repetitive religious experience . . . comes in time to haunt daily life and cast a kind of indirect light upon it."²³ As we live what Geertz calls our "commonsense" lives, subject to all that common sense would tell us to do and avoid doing, the haunting recollection of moments when we have experienced ourselves as in the presence of God does its work.

This work, however, is done as well with those whose religious consciousness manifests very different pictures of God. Two kinds of difference come to mind. One questions the analogy to a willed act of a temporal sovereign with the power and inclination to punish disobedience. It views the "command" of God as "the eternal law[,] . . . part of the very being of God, rather than something merely willed by Him for arbitrary or contingent reasons."²⁴ On such a view, "[e]thical requirements bind the conscience because they are *true*."²⁵

21. *Id.*

22. Mahzor for Rosh Hashanah and Yom Kippur: A Prayer Book for the Days of Awe 258 (Rabbi Jules Harlow ed., 1978).

23. Geertz, *supra* note 15, at 110.

24. Richard Stith, *Images, Spirituality, and Law*, 10 J.L. & Religion 33, 43 (1993-94) (attributing the thought to Saint Thomas Aquinas).

25. Matthew Berke, *A Jewish Appreciation of Catholic Social Teaching, in* Catholicism, Liberalism, and Communitarianism: The Catholic Intellectual Tradition and the Moral Foundations of Democracy 235, 239 (Kenneth L. Grasso et al. eds., 1995) ("[T]he commandments are not regarded here as arbitrary, life-denying impositions that are alien to man's real impulses 'In fact, human freedom finds

So traditional a believer as C.S. Lewis saw a "preoccupation" with reward and punishment as a "corruption" of religion.²⁶ Although he indeed spoke of commands, he described them as:

inexorable, but . . . backed by no "sanctions." God was to be obeyed simply because he was God. Long since, . . . he had taught me how a thing can be revered not for what it can do to us but for what it is If you ask why we should obey God, in the last resort the answer is, "I am."²⁷

Writing of Catholic teaching, Joseph Boyle observes:

[M]oral norms are not, on the Catholic conception, arbitrary impositions by God. They are not tests set up to make life difficult, but the demands of our own rational natures. According to natural law theory, morality is a participation by rational creatures in God's providence so that they may guide their lives to what is genuinely good. Thus, the reason which provides the basis for moral norms is a person's own reason, not something alien or imposed.²⁸

These formulations certainly preserve the idea of divine law as supreme, in that sense ruling over humanity. Yet note the critical role of what I will call moral discernment, "a person's own reason," as the basis for moral norms. A consciousness that can speak of "the demands of our own rational natures" departs in fundamental ways from a command consciousness, which would have difficulty seeing a self-generated call as a demand. The translator of the Soncino edition of the Book of Jeremiah interprets the prophecy that God will put the law on the hearts of the people²⁹ in these words: "I will no longer be something external to them, but so deeply ingrained in their consciousness as to be part of them."³⁰ Here we have important beginnings of a relational approach to obligation in which the human task is not merely to obey an external command, but to bring to bear that within which makes possible the alignment of human and divine will.

Jeremiah's prophecy is a reprise of the memorable reassurance of Moses himself, that the commandment to "turn to the Lord your God

its authentic and complete fulfillment precisely in the acceptance of that law." (quoting Pope John Paul II)).

26. C.S. Lewis, *Surprised By Joy: The Shape of My Early Life* 231-32 (1955).

27. *Id.* at 231.

28. Joseph Boyle, *Duties to Others in Roman Catholic Thought*, in *Duties to Others* 73, 84 (Courtney S. Campbell & B. Andrew Lustig eds., 1994) (citations omitted).

29. *Jeremiah* 31:33-34:

But this is the covenant that I will make with the house of Israel after those days, says the Lord: I will put my law within them, and I will write it on their hearts; and I will be their God, and they shall be my people. No longer shall they teach one another, or say to each other, "Know the Lord," for they shall all know me, from the least of them to the greatest

Id.

30. *Jeremiah* 31:30 n.32 (Soncino Books of the Bible 1959).

with all your heart and with all your soul . . . is not too hard, nor is it too far away”:

It is not in heaven, that you should say, “Who will go up to heaven for us, and get it for us so that we may hear it and observe it?” Neither is it beyond the sea, that you should say, “Who will cross to the other side of the sea for us, and get it for us so that we may hear it and observe it?” No, the word is very near to you; it is in your mouth and in your heart for you to observe.³¹

In our hearts: The metaphor suggests an even fuller source of “obedience” than either sovereignty outside or reason within. A third, more far-reaching variant in the religious tradition eschews a stark emphasis on inexorability and rationality in the fulfillment of obligation, and understands that within us as not sufficiently described as reason. Law professor Emily Fowler Hartigan has written of a feminist spirituality that experiences the word of God as “a gentle draw, more than a compelling force, an invitation more than a command, . . . [an] ‘ought’ that beckons more deeply than it threatens.”³²

The centrality of this strain in the religious tradition is no more meaningfully exemplified than in the words of Jesus at Gethsemane: “My Father, if it is possible, let this cup pass me by. Yet not my will but yours.”³³ Jesus’ “submission” was an act of love, reciprocal to the love that he experienced. Robert Bolt understood this when he had his Sir Thomas More, hearing his daughter’s heartfelt appeal, “[h]aven’t you done as much as God can reasonably *want*?” respond, “it isn’t a matter of reason; finally it’s a matter of love.”³⁴ In describing what he means by religious consciousness, Quaker sage Douglas Steere has focussed in this manner on the words, “attentiveness” and “obedience”:

Without attentiveness in both our private and public worship, there can be only a confirmation of the African proverb that says, “When God speaks, He does not wake up the sleeper.”

But unless this precious attentiveness is linked to obedience, the deeper bond is missing. To come near to God is to change, and unless there is obedience, a change of will . . . , I have failed the love that bid me to join God. . . .³⁵

The account of Jesus at Gethsemane most powerfully describes the “change of will” achieved through reciprocal love, experienced from both within and without the human actor. “Distress and anguish overwhelmed him, and he said to [his disciples], ‘My heart is ready to

31. *Deuteronomy* 30:12-14.

32. Emily Fowler Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 Harv. C.R.-C.L. L. Rev. 67, 89 (1991).

33. *Matthew* 26:39.

34. Robert Bolt, *A Man for All Seasons: A Play in Two Acts* 141 (1960).

35. Douglas V. Steere, *Traveling In* 23-24 (E. Glenn Hinson ed., 1995).

break with grief. Stop here, and stay awake with me.”³⁶ Yet the weakness that was an ineradicable aspect of Jesus’ humanity loosened its power over his actions in the moment that his prayer brought him into intimate relation with God.

There is then a complexity and variousness in the religious bases of obligation. The Supreme Court first seriously grappled with this variousness in two decisions interpreting the Congressional exemption from compelled military service of certain conscientious objectors to participation in war. The Selective Service Act provision then in force defined the “religious training and belief” that would ground conscientious exemption from the draft as “an individual’s belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a purely personal moral code.”³⁷ Notwithstanding this explicit contrast between an external power that is superior to the individual and a “purely personal moral code,” the Supreme Court declared in *United States v. Seeger*³⁸ that it is the place of belief “in the life of the objector,” the *binding force* of the constraint upon the conscience, that is critical; the source of a belief within or outside the person was explicitly held irrelevant to its “religious” quality.³⁹ In *Welsh v. United States*,⁴⁰ a plurality of the Justices again emphasized the salience of the strength rather than the source of a person’s moral scruples. It read *Seeger* to apply to a person’s “moral, ethical, or religious beliefs about what is right and wrong,” even if they are acquired entirely through secular studies, as long as they are held “with the strength of traditional religious convictions.”⁴¹ Four Justices held that beliefs that “function as a religion” in a person’s life are “religious,” even within the meaning of the specific statute involved.⁴²

It is a further question whether one should be deemed acting out of a religiously grounded obligation and the actor is (as *Seeger* and *Welsh* were not) a member of a faith community when the act that he or she feels compelled to do (or abstain from doing) is not required (or forbidden) by the tenets of that faith. From a highly command-

36. *Matthew* 26:38.

37. 50 U.S.C. app. § 456(j) (1958).

38. 380 U.S. 163 (1965).

39. *Id.* at 184.

40. 398 U.S. 333 (1970).

41. *Id.* at 340.

42. *Id.* The prevailing Justices divided over the question whether the language of the statute involved in *Seeger* and *Welsh* could be read so broadly. Justice Harlan would have characterized the moral beliefs at bar as secularly rather than religiously grounded, but concurred in the result on the ground that the Establishment Clause forbade Congress from honoring the latter without also accommodating the former. *Welsh*, 398 U.S. at 344-54. See also the brief discussion in Greenawalt, *supra* note 15, at 760. The dissenting Justices shared Harlan’s view of the meaning of the statute, but would have upheld the constitutionality of it so viewed. *Welsh*, 398 U.S. at 367-74.

oriented view of religion, such beliefs are "optional," and scruples based on them, even if not "secular," are "merely personal." Yet, to one who thinks of his or her relation with God in a more relational way, the boundaries of obligation are not so narrowly drawn.

The Supreme Court has given ambiguous recognition to this broader view of religiously-based obligation in two cases dealing with eligibility for unemployment insurance. In *Thomas v. Review Board of the Indiana Employment Security Division*,⁴³ a Jehovah's Witness had been employed by a private company in its foundry which made sheet steel for industrial uses. When the foundry was closed, the employer reassigned Thomas to a unit that made turrets for tanks. He objected, on the ground that his religion called on him not to work on the direct production of weapons. He had consulted a fellow employee who was also a Witness, who responded that doing such work was not "unscriptural." Thomas, however, asserted that he was not able to "rest with" this view. When the employer proved unable or unwilling to provide alternative acceptable employment, he resigned and sought unemployment insurance benefits.⁴⁴ The specific legal issue implicated (in ways that need not concern us here) the question of whether his actions were religiously grounded.

The Indiana Supreme Court characterized Thomas' decision as "[a] personal philosophical choice rather than a religious choice," noting his fellow worker's contrary view and the fact that Thomas admittedly was struggling with his beliefs and found it difficult to articulate precisely where he would draw the line.⁴⁵ (Some of the steel he had been working to produce doubtlessly found its way into military equipment). In reversing, the Supreme Court was influenced in significant part by its view that judges should not decide whether "petitioner or his fellow worker more correctly perceived the commands of their common faith." As Chief Justice Burger, for the Court, asserted: "Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."⁴⁶

In *Frazee v. Illinois Department of Employment Security*,⁴⁷ the Supreme Court applied this approach to a claimant who was not a member of any church or sect, but refused, simply because he was a Christian, to work on Sunday. The Board of Review held him disqualified from unemployment insurance, rejecting his constitutional claim

43. 450 U.S. 707 (1981).

44. *Id.* at 710-11.

45. *Id.* at 713, 715 (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 391 N.E.2d 1127, 1131 (Ind. 1979)).

46. *Id.* at 716.

47. 489 U.S. 829 (1989).

in these pertinent words: "When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma . . . of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling"⁴⁸

The Supreme Court rejected this characterization, holding that the sincerity of the claim, and not its grounding in organizational membership, was the relevant criterion. "Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief," noting that in *Thomas* "there was disagreement among sect members" as to the permissibility of the practice in question.⁴⁹

I believe that the sincerity requirement is the substantive lens through which more individualized, even idiosyncratic, claims should be examined.⁵⁰ The deeper question is that involving a sincere claimant who did belong to a specific recognized denomination but took a more far-reaching view of his or her obligation than did the community itself. An example would have arisen had the State been able in *Thomas* to produce clear documentation that the Witnesses as a religious organization had in some manner clearly upheld the permissibility of work like that which Thomas refused.

The Religious Freedom Restoration Act sought to protect conduct that is "a person's exercise of religion."⁵¹ An attempt to limit that protection to conduct "compelled" by one's religion was rejected in Congress.⁵² Moreover, an important opinion by Judge Posner squarely disapproved of suggestions in the language of some opinions that religious motivation will not suffice for protection, preferring a "more generous" approach as "more sensitive to religious feeling."⁵³ The

48. *Id.* at 829-30.

49. *Id.* at 833.

50. *Cf.* *State v. Hodges*, 695 S.W.2d 171 (Tenn. 1985). *Hodges* deals with a defendant who claimed religious grounds for appearing in court dressed in fur tied at several points along his body but leaving his chest and back naked to the waist, his face and chest painted pale green, wearing goggles, and carrying or holding a stuffed snake and a human skull. *Id.* at 171 n.1. The Court held that he was entitled to a hearing on the sincerity issue, on which the fact (if it proved to be so) that defendant was "the sole adherent" to his claimed religion "may be decisive." *Id.* at 173. See the discussion of the problem of "the radically variant view of a single individual" in Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *Fordham Urb. L.J.* 85, 96 & n.53 (1988).

51. 42 U.S.C. §§ 2000bb-1(a)-(b) (1994).

52. The story is told in Doug Laycock's article, co-authored with Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 *Tex. L. Rev.* 209, 230-34 (1994).

53. *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996). He went on:

Many religious practices that clearly are not mandatory, such as praying the rosary, in the case of Roman Catholics, or wearing yarmulkes, in the case of Orthodox Jews (optional because while Jewish men are required to cover

Supreme Court's invalidation of the statute on federalism grounds⁵⁴ does not undermine the normative salience of this history.

The Massachusetts Supreme Judicial Court has taken a more ambiguous view under a state statute and the Non-Establishment principle. *Pielech v. Massasoit Greyhound, Inc.*⁵⁵ involved a Massachusetts law prohibiting employer insistence, as a condition of employment, on any act that would require an employee to forgo "the practice of his creed or religion as required by that creed or religion"⁵⁶ Two Roman Catholic employees of a greyhound track were disciplined for refusing to work on a regularly scheduled Friday evening because it was Christmas night. Each party produced an affidavit from a Catholic priest. The defendant's affidavit asserted that the only obligation on Christmas is to attend Mass between 4:00 p.m. the previous day and 1:00 p.m. on Christmas Day, and the plaintiffs' affidavit suggested that there was a general requirement (applicable to any holy day of obligation) to "abstain from those labors and business concerns which impede the worship to be rendered to God, the joy which is proper to the Lord's Day, or the proper relaxation of mind and body, although [work was permitted to] support [one's] family or to maintain [a] livelihood."⁵⁷ On that basis, the trial court ruled for the defendants:

The only requirement the church absolutely imposes upon its followers is to attend mass. Plaintiffs were not denied the opportunity to attend mass, and therefore, plaintiffs cannot establish that they were forced to forgo a practice required by their religion. The fact that plaintiffs wished to further observe the Christmas holiday does not constitute a religious requirement.⁵⁸

The Supreme Judicial Court regarded the statute before it as specifically limiting protection to practices "*required* by that religion." Much like Justice Harlan in *Walsh*, however, the court, first holding that the statute could not bear any broader meaning, went on to declare it unconstitutional. The scruples of employees whose "sincere religious beliefs differ from the established dogma of their religion or are not accepted as dogma by any religion" must be given equal recognition.⁵⁹

their heads, the *form* of the head covering is not prescribed), are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty.

Id.

54. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

55. 668 N.E.2d 1298 (Mass. 1996).

56. Mass. Gen. Laws ch. 151B, § 4(1A) (1997).

57. *Pielech*, 668 N.E.2d at 1300.

58. *Id.*

59. *Id.* at 1301. Moreover, the court reasoned, to require the judiciary "to ascertain the requirements of the religion at issue" violates the prohibition of excessive entanglement of courts in religious disputes. *Id.* at 1303.

The court's statutory analysis is curious, but may in part rest on a sharp distinction between a requirement and a motivation, however strongly felt. Such an approach fits effortlessly with the tendency to recognize religious requirements only if experienced in the command tradition.⁶⁰ The temptation to take it, however, surely needs to be resisted. "Requirement," and certainly "obligation," should not be so cabined. Would we say, for example, that the pacifism of Trappist monk Thomas Merton, whose tradition permits participation in a "just war," was not a religiously grounded obligation but merely a "personal choice"?⁶¹

Let me illustrate the point more fully with a powerful recollection. How many today remember Martin Niemöller? A German Lutheran Pastor imprisoned during the War for anti-Nazi activities, he was, to at least one American Jewish teenager, a very bright star in a very dark sky. In 1961, now a Bishop, he spoke in Philadelphia, and I went to pay my respects as much as to hear him. He had been a U-boat (submarine) commander in the German Navy during the First World War, and spoke of how he had subsequently become a pacifist:

I would watch through the periscope for the enemy vessel, and when the crosshairs were amidships of it, I would say, "fire." The sailor standing by would press a button, and I would watch the torpedo's wake and the hoped-for explosion. One day, years later, I asked myself, if Jesus of Nazareth had been that sailor, when I ordered, "fire," would he have pushed the button?

60. The statute before the Supreme Judicial Court protected "the practice of his creed or religion as required by that creed or religion . . ." *Id.* (quoting Mass. Gen. Laws ch. 151B, § 4(1A) (1997)). The court either believed that "that creed or religion" could not be that of the individual claimant, but only that of the institution, or it believed that, if the reference were to the individual's creed or religion, it was anomalous to deem the practice in question "required;" the statute did not, after all, refer to practices "motivated by" or "grounded in" religion. Both grounds seem curiously unnecessary, given that the court saw the constitutionality of the statute at stake, but the second—which for our purposes is the more significant—was not given voice in any judicial language.

The ultimate curiosity is that the court, having held the statute unconstitutional because it failed to protect plaintiffs, ruled that they therefore could not rely on it at all, and dismissed the complaint. There was no discussion of the alternatives following a judgment of invalidity because of underinclusiveness. On such an approach, the claimants in *Seeger* and *Walsh* also would have lost their suits.

61. The sequel to the *Pielech* decision, interestingly enough, lends support to a broader view of obligation. The Massachusetts legislature, seeking to "restore the right of individuals to be free from discrimination in the workplace based on their sincerely held religious beliefs," amended the statute to overrule the construction given it by the Supreme Judicial Court. The words, "creed or religion," are now defined to include "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." S. 105, 181st Gen. Ct., Reg. Sess. (Mass. 1997), available in WL, 1997 MA S.B. 105. The Supreme Judicial Court had held that enactment of the Bill would not violate the Establishment Clause. See Opinion of the Justices to the House of Representatives, 673 N.E.2d 36 (Mass. 1996).

One could hardly say that Niemoller's decision was "personal" rather than "religious" in its motivation. But was it "required," or only a "choice"? He had commented on an announcement that happened to be on the blackboard of the room where he spoke, regarding a discussion (in those Cold War years) of the subject, "Theism vs. Atheism in the Conflict of Nations," and had provocatively told us that, in his view, it did not matter whether you were a theist or an atheist. Rather, the important question was whether you were a Christian. Of course, he then had to tell us what the term meant to him: "A Christian," he said, "is one who accepts Jesus as teacher and brother." Would anyone conclude, however, that he was not obligated but only chose to give up warfare because he experienced Jesus as "only" teacher and brother rather than as Lord, because his retrospective experience of the presence of Christ in the submarine was as inspiration rather than commander?

Niemoller's account recalls to me a famous teaching of George Fox, the founder of the Religious Society of Friends: "Christ was come to teach his people himself."⁶² It is critically important not to allow the traditional idea of God as sovereign preempt the field, as it were, confining the notion of obligation within rigid hierarchical concepts and equating the idea of obligation with that of compulsion. Consciousness of the divine presence can work to inspire, to enable, as well as to overpower. It can set a person free to act, even in the face of the gravest danger, and does not operate merely as a counter-threat.⁶³

B. *Integration*

Note the distinction between an obligation to attend a religious service, to observe the Sabbath, to refrain from eating meat during Lent or pork at any time, or to remove (or wear) one's hat or shoes in the sanctuary; and an obligation not to work in the production of weapons, serve in the armed forces, or, to recall the example with which this essay began, represent a person seeking to do an illicit (but lawful) act. The distinction is not that one sort is more "religious" than the other, nor is it meant, I believe, to suggest a distinction between ritual and ethics. It is that, far from exhausting the category of the religious act, practices of the first sort ordinarily imply the existence of those of the second, and are meant to support them. The religious tradition rejects the notion—however much it may accurately be reflected in the lives of many who regard themselves as religious—that its imperatives are satisfied by observance of ritual. Hear again the searing words of Amos:

62. 1 The Journal of George Fox 113 (Norman Penney ed., 1911).

63. See also the extremely powerful account by another German, Emil Fuchs, *Christ in Catastrophe* (1949), of the way in which his direct experience of the presence of Christ in his prison cell enabled him to resist, at great cost, Nazi oppression.

I hate, I despise your festivals, and I take no delight in your solemn assemblies. Even though you offer me your burnt offerings and grain offerings, I will not accept them; and the offerings of well-being of your fatted animals I will not look upon. Take away from me the noise of your songs; I will not listen to the melody of your harps. But let justice roll down like waters, and righteousness like an everflowing stream.⁶⁴

In the Jewish tradition, with its 613 commandments, their intended effect is "not to drain away energies better spent on moral concerns, but rather to fabricate a system of life in which restraint, self-discipline, and the tendency to relate every facet of human existence, however apparently inconsequential, to the will of God become[s] a matter of instinct."⁶⁵ To that end, the Talmud articulates a "rule" that is not satisfied by recitation of prescribed prayers: "Prayer should not be recited as if a man were reading a document. . . . If a man makes his prayer a fixed task[], his prayer is no supplication."⁶⁶ One should pray only when he can "direct his heart."⁶⁷

To no realm of life does this principle have greater salience than one's work. Islamic scholar Seyyed Hossein Nasr has expressed the thought eloquently:

There is a *Hadith* [saying of the Prophet] according to which when a man works to feed his family he is performing as much an act of worship as if he were praying. . . .

. . . The *Shari'ah* [revealed law] gives a religious connotation to all the acts that are necessary to human life In this way the whole of man's life and activities become religiously meaningful. Were it to be otherwise man would be a house divided unto itself, in a condition of inner division and separation which Islam tries to avoid.⁶⁸

What Nasr writes of Islam characterizes no less the teaching of other branches of the religious tradition. Let me here set forth illustrations drawn from several faith traditions.

The Vietnamese monk Thich Nhat Hanh describes the Buddhist principle of "right livelihood":

Right livelihood implies practicing a profession that harms neither nature nor humans, either physically or morally. . . . We live in a society where jobs are hard to find and it is difficult to practice right livelihood. Still if it happens that our work entails harming life, we should try our best to secure new employment. We should not al-

64. *Amos* 5:21-24.

65. Ronald M. Green, *Religious Reason: The Rational and Moral Basis of Religious Belief* 136 (1978). Green goes on: "If the moral life has, as one of its vital preconditions, an integrated, disciplined and attentive self, then one important effect of Jewish law, both in its moral and religious dimensions, was to create this kind of ordered and sensitive personality." *Id.*

66. C.G. Montefiore & H. Loewe, *A Rabbinic Anthology* 349 (1974).

67. *Id.* at 347.

68. Seyyed Hossein Nasr, *Ideals and Realities of Islam* 98 (1966).

low ourselves to drown in forgetfulness. Our vocation can nourish our understanding and compassion, or it can erode them. Therefore, our work has much to do with our practice of the Way.⁶⁹

To my law school colleague Seth Kreimer, "if Judaism teaches anything, it is that power brings with it responsibility."⁷⁰ Writing about the responsibilities of the Jewish lawyer, he goes on:

To the Jew who takes tradition seriously, daily life is ringed with obligations. . . . [T]he sense that moral responsibility pervades daily life is one which we share as heirs of a tradition which does not draw boundaries which set religious obligations to one side as we enter secular life.

As Jewish lawyers, we cannot act in a moral vacuum. At a minimum, we must recognize that our professional acts have morally freighted consequences. . . . [E]very choice we make as lawyers, in will contests, divorce proceedings, products liability actions or proxy fights, has an impact on the lives that are lived by the victims or beneficiaries of our actions, and the integrity of the system of justice in which we participate. We cannot claim indifference to those effects because we act on behalf of clients. Our . . . tradition requires us to be alive to the moral dimensions of the choices we make in our professional lives.⁷¹

Law professor Joseph Allegretti, in a remarkable book subtitled *Christian Faith and Legal Practice*, has described the central challenge as "one of balance, of integration":

[I]f I begin to bring my religious values with me into the workplace, a curious thing happens. My work is placed in a wider, deeper frame of meaning. No longer am I a lawyer who happens to be a Christian on Sunday, but a follower of Christ who is trying to live out my Christian calling within my role as a lawyer. It is a small shift, just a rearrangement of a few words, to move from a *lawyer who is a Christian* to a *Christian who is a lawyer*, but in that small shift a whole new way of looking at work emerges⁷²

So, for example, while Levinson's first model of "the Jewish Lawyer," what he terms the intersection of sets, or the subset of Jewish people who also are lawyers, "carries with it no implications about the actual intersection of one's Judaism with one's practice,"⁷³ one would not term such a person a "religious lawyer," and, whatever implica-

69. Thich Nhat Hanh, *Interbeing: Commentaries on the Tiep Hien Precepts* 51 (1987).

70. Seth Kreimer, *The Responsibilities of the Jewish Lawyer* 2 (unpublished article on file with the author). See also Sam Levine's discussion of his search among the writings of the Sages for guidance in finding and carrying on "a career related to more internal matters of religion, affecting my moral character and spirituality." Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 Tex. Tech L. Rev. 1199, 1203 (1996).

71. Kreimer, *supra* note 70, at 2-3.

72. Allegretti, *The Lawyer's Calling*, *supra* note 13, at 126.

73. Levinson, *supra* note 11, at 1586.

tions might attend his or her practicing within a "pluralist society," they would not be of present interest.⁷⁴

It is here, of course, that the area of discord is centered, for the concept that I have termed *integration* regards the "religious lawyer" as most essentially described by the adjective, and only contingently by the noun, in Allegetti's terms, a Christian who is a lawyer rather than a lawyer who is a Christian. Levinson has described this source of discord by the evocative metaphor of professional norms as "bleaching out" one's religion (along with such other "merely contingent aspects of the self" as race, gender, or ethnic background). The objective of the "standard version of the professional project," Levinson asserts, is "the creation, by virtue of professional education, of almost purely fungible members of the respective professional community."⁷⁵ The opinion of the Tennessee Board of Professional Responsibility that opens this essay is characteristic of this stance.⁷⁶

Our consciousness of the very different call of the religious tradition has been greatly informed by the writing of Professor Thomas Shaffer. He has reminded those of us who work within the legal profession that the religious tradition stands against any such bleaching out. The religious idea of "vocation," Shaffer insists, is not limited to the call to take orders. A lawyer, like any other person taking up a work life, is "called out of the church, sent out from the particular people, to do something that is religiously important."⁷⁷ The religious lawyer "stands in the community of the faithful and looks from there at the law. . . . [S]he is first of all a believer and is then a lawyer."⁷⁸ A notion of professionalism that sees the professional as "having been removed from his organic community . . . and transported into an institution" is a "complex of pretenses" and a "pernicious form of corruption."⁷⁹

To Shaffer, I hardly need add, "the church" is not a building, but it also is not the institutional Roman Catholic Church or the specific priest and congregation with whom he worships.⁸⁰ It is the community of people, the spiritual descendants of the communities of Jewish and gentile Christians described in the Book of Acts and the Letters of Paul, "where the connection between faith and work is developed,

74. The subject would be of interest with respect to a society that was both secular and anti-semitic. Twentieth-century history does not lack examples.

75. Levinson, *supra* note 11, at 1578-79.

76. See *supra* notes 6-9 and accompanying text.

77. Thomas L. Shaffer, *The Tension Between Law in America and the Religious Tradition, in Law and the Ordering of Our Life Together* 28, 45 (Richard John Neuhaus ed., 1989).

78. Thomas L. Shaffer & Mary M. Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* 198 (1991). For a further discussion, see *id.* at 213-17.

79. Shaffer, *supra* note 77, at 49.

80. See Shaffer & Shaffer, *supra* note 78, at 199.

talked about, described truthfully,"⁸¹ and "where questions of priority and behavior are resolved in discussion," in company with the Holy Spirit.⁸²

To what extent the State-promulgated norms of professional responsibility should facilitate, to what extent obstruct, a lawyer's desire to practice in ways that are "religiously important" is the question of Part II of this essay. It is the aspects of religious consciousness heretofore addressed—obligation and integration—that place the question on the agenda of "a pluralist society."

C. Transcendence

To describe as "religious" one who feels bound to obey certain moral precepts throughout his or her life activities is obviously using the term overinclusively, for there are many who can justly claim to meet fully the criteria of obligation and integration, yet abjure, even spurn, the label—either on philosophical grounds or because of the manifold crimes that have been committed in the name of God throughout the world and across the centuries.⁸³ Being religious is more than living a good life, an integrated life, despite the temptations to depart from that path which the world places before us.

Rabbi Abraham Joshua Heschel, like many others, has described the "more" in terms of the holy: "The good is the base, the holy is the summit. Things created in six days He considered *good*, the seventh day He made *holy*."⁸⁴ To express the "more" of holiness, or sacredness,⁸⁵ in words is not easy, and much profound teaching, written and oral, has been devoted to the effort. The great nineteenth-century Christian theologian Rudolf Otto coined the word, *numinous*, to describe that "more," associating it with the *mysterium tremendum*—the feeling of the presence of an awesome power before which we are wholly submerged.⁸⁶ To the twentieth-century historian of religion, Mircea Eliade, the sacred manifests itself as reality, a reality "of a wholly different order from 'natural' realities."⁸⁷

What, to me, undergirds these conceptions is an openness to awe, triggered perhaps by the apprehension of awesome power but also by

81. *Id.*

82. Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant; If Not . . .*, 27 Tex. Tech L. Rev. 1345, 1350 (1996).

83. For an understanding discussion of such a reaction, see Merold Westphal, *Suspicion and Faith: The Religious Uses of Modern Atheism* (1993).

84. Abraham Joshua Heschel, *The Sabbath* 75 (1966) (published with Abraham Joshua Heschel, *The Earth is the Lord's*).

85. The word, holy, is associated in current usage with a judgmental or self-righteous piety. The word, sacred, better fits the sense, which I will develop here, of openness to awe.

86. Rudolf Otto, *The Idea of the Holy: An Inquiry into the Non-Rational Factor in the Idea of the Divine and its Relation to the Rational* 2-30 (1958).

87. Mircea Eliade, *The Sacred and the Profane: The Nature of Religion* 10 (Wilard R. Trask trans., 1959).

an "appreciation of the possibility of meaning and moral order,"⁸⁸ of an "overpowering, nonrational appreciation of purity and completeness in the world and purpose and caring in all life."⁸⁹ This is the stance that Rabbi Heschel felicitously called "radical amazement,"⁹⁰ the experience of time as tinged with eternity, finitude with infinity, the mundane as embodying the transcendent. It is a stance that has been given expression by the rabbis in a wonderful variety of ways. The Hasidic sage, Rabbi Nachman of Breslov, enjoined us: "Seek the sacred within the ordinary. Seek the remarkable within the commonplace."⁹¹ Rabbi Joseph Soloveitchik describes holiness as "the appearance of a mysterious transcendence in the midst of our concrete world [It] does not wink at us from 'beyond' like some mysterious star that sparkles in the distant heavens, but appears in our actual, very real lives."⁹² Similarly, Rabbi Harold Schulweis writes of "miracles" in this vein:

A miracle is an intimation of an experience of transcending meaning. The sign-miracle does not refer to something beyond or contrary to logic or nature. It refers to events and experiences that take notice of the extraordinary in the ordinary, the wonder in the everyday, the marvel in the routine. . . .⁹³

The most prosaic object can be the subject of this awareness. To Rabbi Schulweis, "[b]reaking bread is as miraculous as dividing the sea."⁹⁴ Writing about the iconic tradition of Eastern Christianity, law professor Richard Stith quotes an eloquent instantiation of this idea:

What is a nut if not the image of Jesus Christ? The green and fleshy sheath is His flesh, His humanity. The wood of the shell is the wood of the Cross on which that flesh suffered. But the kernel of the nut from which men gain nourishment is His hidden divinity.⁹⁵

88. Daniel C. Maguire, *The Moral Core of Judaism and Christianity: Reclaiming the Revolution* 33 (1993).

89. Samuel H. Weintraub, *The Spiritual Ecology of Kashrut*, *Reconstructionist*, Winter 1991/1992, at 132, 133. Compare Vanessa Ochs' eloquent personal testimony:

I knew what the sanctified life was not. Not a life filled with more rituals, more scrupulously observed. Not more praying. Not becoming a better person, being more charitable, more concerned with everyone else's pains. Sanctifying had something to do with a sense of constant wonder—feeling gratitude and finding significance everywhere, in every action, relationship, and object.

Vanessa L. Ochs, *Words on Fire: One Woman's Journey into the Sacred* 5 (1990).

90. Abraham Joshua Heschel, *Man Is Not Alone: A Philosophy of Religion* ch. 2 (1951).

91. Nachman of Breslov, *The Empty Chair: Finding Hope and Joy* 59 (Moshe Mykoff ed., 1994).

92. Joseph B. Soloveitchik, *Halakhic Man* 46 (Lawrence Kaplan trans., 1983).

93. Harold M. Schulweis, *For Those Who Can't Believe: Overcoming the Obstacles to Faith* 56 (1994).

94. *Id.* at 61.

95. Stith, *supra* note 24, at 42 n.34.

A well-known quatrain of William Blake's is as good a rendering of the idea in words as I know:

To see a World in a Grain of Sand
And a Heaven in a Wild Flower,
Hold Infinity in the palm of your hand
and Eternity in an hour.⁹⁶

As Blake's words suggest, a sense of the sacred need not be theistic. What is essential, however, is that this openness, this experience, not be confined to time spent in church, synagogue, or mosque, listening to a Beethoven Quartet, or standing before crashing waves or a brilliant sunset, but be sought in the moment-to-moment hurly-burly of everyday life. In Rabbi Heschel's words, the goal is "to experience commonplace deeds as spiritual adventures, to feel the hidden love and wisdom in all things."⁹⁷ At any moment, wherever we may be, we need only wake, like Jacob, from our dream to realize: "Surely the Lord is in this place—and I did not know it!"⁹⁸

II. A PLURALIST SOCIETY

The normative position that I believe the foregoing section grounds is that a pluralist society should whole-heartedly make room for the moral constraints under which religious lawyers might be moved to act. Far from needing to be "bleached out" by the norms of professionalism, a lawyer's desire to guide his or her actions by the qualities I have described—a sense of obligation to perceived moral imperatives, a commitment to the integration of personal and professional life, and a sense of transcendence in the world and those who inhabit it—should be presumptively welcomed as socially desirable characteristics, which enhance both the inherent quality and the likely consequences of interactions that lawyers have with clients, third parties, and the legal system. A polity that encourages its citizens to bring to bear their own serious moral reflections on the morally significant decisions they face will be more likely to grow in justice and humanity.⁹⁹

96. William Blake, *Auguries of Innocence*, in II The Oxford Anthology of English Poetry 10, 10 (John Wain ed., 1990).

97. Abraham Joshua Heschel, *God in Search of Man: A Philosophy of Judaism* 49 (1955).

98. *Genesis* 28:16.

99. Recall Justice Black's memorable plea that we not, by overriding individual perhaps idiosyncratic moral scruples, move closer to becoming an "orthodox, time-serving, government-fearing" people. See *In re Anastaplo*, 366 U.S. 82, 116 (1961) (Black, J., dissenting).

Recall too that I am not making a constitutional argument. For a skeptical analysis of some asserted bases of constitutional protection for religiously (and secularly) motivated claims of "privilege," see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1254-70 (1994). For their alternative approach, see *id.* at 1282-1311.

In finding in its pluralist quality a counsel of restraint in its encounters with the varying religious scruples of individual attorneys, society is therefore not merely indulging an individual's interests, but recognizing their "collective value" as well.¹⁰⁰

In an exchange of correspondence, Professor Teresa Stanton Collett has challenged me to consider whether pluralism in our society can be viewed as something to be celebrated only from a stance of moral relativism. If one believes, as she and I both do, that some important moral claims have truth value, is not the diversity of pluralism about morality rather an unfortunate necessity, which must be accepted in a "fallen" world and a free society, but ought not be given powerful normative force?

To me, the problem with objective truth is not its existence, but its accessibility to our discernment. There is simply nothing I (or anyone) can say about Truth, Reality, or God that escapes the limitation of being an expression of my (or their) understanding of Truth, Reality, or God.¹⁰¹ One can perhaps attribute this fact to "original sin," as Collett would, but in my judgment only in the sense that we are creatures who can only "see through a glass, darkly."¹⁰² The term is misapplied to the extent that it responds regretfully to the fact that we have been created with diverse discernments of the demands of moral truth. If my understanding of the truth is necessarily situated and partial, the neighbor or public figure whom I least respect, one to whom I least would naturally turn as a source of moral guidance, may in fact, in his or her last utterance, have discerned a portion of that truth. History confirms the judgment of reason that, especially in a fallen world, only a robust commitment to freedom of conscience can save us from the rule of grave moral evil, whose link with power enables it to masquerade as goodness and truth.

There is more to be said, however. Individual lawyers also need to be counseled by the pluralist quality of our society and the inaccessibility of epistemic certainty. Vis-à-vis their clients, they exercise power, quasi-public in nature, and in approaching the place of their religious scruples in the lawyer-client interaction, lawyers need to recognize that their religious principles, although in some instances constitutive of their identities and to them a simple acknowledgement of ontological truth, are neither politically normative nor necessarily

100. Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 965-66 (1995). Underkuffler-Freund adduces substantial historical sources designed to support this conclusion. See *id.* at 874-960.

101. For a clear and persuasive philosophical statement grounding this belief in the incapacity of a "transcendent Moral Law (or the like)" to foreclose debate about its content, see Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* 21-35 (1988).

102. 1 *Corinthians* 13:12.

shared by their clients. Pluralism cuts both ways, and the task is for neither pole to displace the other.

A. *The Profession's Stance Toward the Religious Lawyer*

Recall that the inquiring attorney was described in the Ethics Opinion as "a devout Catholic [who] cannot, under any circumstances, advocate a point of view ultimately resulting in what he considers to be the loss of human life."¹⁰³ His objection to being assigned as counsel for a minor seeking a judicially authorized abortion was grounded in a recognition of personal responsibility for the client's desired outcome, a flat refusal to accept the balm, for example, of the principle expressed in Model Rule 1.2(b), that his representation would not "constitute an endorsement" of the client's "moral views or activities."¹⁰⁴ Some find in this principle a sufficient basis to permit attorneys to deny responsibility, while others do not, but what is the justification for a rule imposing the principle on one for whom it rings hollow?¹⁰⁵

The Board's answer seems to reflect a fear of undermining the ability of judges to require counsel to accept unwelcome appointments, especially in criminal cases. In rejecting the attorney's effort to invoke the norms of conflict of interest—"his religious beliefs are so compelling that [he] fears his own personal interests will subject him to conflicting interests and impair his independent professional judgment"—the Board relied on the Model Code's Ethical Consideration 2-29, which admonishes a lawyer, appointed by a court or asked by a bar association to represent a person unable (for whatever reasons) to obtain counsel, not to "seek to be excused . . . except for compelling reasons."¹⁰⁶ This is an unexceptionable admonition which seems to be addressed to the professional conscience of individual lawyers, and as such suggests a subjective concept of "compelling." Plainly, what appears compelling to me will often seem different to you.

The Model Code's Ethical Consideration 2-29 goes on, however, to write an objective and highly abstract specification of the idea:

Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defend-

103. See *supra* note 2 and accompanying text.

104. Model Rules, *supra* note 4, Rule 1.2(b).

105. The literature is vast. For justificatory exemplars, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613. For skeptical analyses, see, for example, David Luban, *Lawyers and Justice: An Ethical Study* 50-103 (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1 (1975). Professor Pepper's approach, to one who found it persuasive, would supply an answer to the question posed rhetorically in the text.

106. Model Code, *supra* note 4, EC 2-29.

ant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.¹⁰⁷

The Board saw in this provision a predicate for its holding that "religious and moral beliefs, [even if] clearly fervently held," are not the sort of compelling reasons that may ground withdrawal. The inquiring attorney's basis of objection was deemed like one based on "distaste" for the offense charged or the defendant's unpopularity in a criminal case. The Board concluded that "[c]ounsel's moral beliefs and usually acceptable ethical standards and duties must yield to the moral beliefs and legal rights of the defendant."¹⁰⁸

I have no quarrel with the concern of the Board, the courts, and the organized bar generally to take a "man the dikes" approach to the problem of assisting criminal court judges (in those many jurisdictions that lack a minimally adequate defender system) to maintain the availability of assigned counsel. To accept personal reasons for unwillingness, given the pervasive inadequacy of compensation and litigation support for criminal defense work, may well be to step out onto a slippery slope, and judges are understandably wary of straying onto that first step. But there is no basis for presuming across the board, and nothing in the description of this particular Tennessee setting, for concluding that the criminal defense analogy should dominate our thinking here, especially when that tendency leads to so airy a dismissal of important countervailing values. If such a dismissal is legitimated in this case, where it is not difficult to accept the sincerity and strength of the lawyer's aversion, one can only imagine the fate of religiously motivated scruples that are less mainstream.¹⁰⁹

It is wise and defensible for our professional norms to admonish attorneys that their responsibility is to think carefully and to exercise restraint before deciding to place their moral scruples in the way of a

107. *Id.* (citations omitted).

108. Formal Op. 96-F-140, *supra* note 1.

109. Indeed, given that the attorney practices "routinely" in the Juvenile Court, and had been appointed to represent minors seeking an abortion more than once before, I am led to wonder about the motivation of the judge, who presumably knew the lawyer's religion, for making the appointments. It is possible, but hardly likely, that he was doing it out of hostility to the lawyer, or—as we too often boast of doing in law school—to teach him the skill (and the joys) of arguing "the other side." Rather, my fear—although based on no evidence at all—is that the appointments reflected the judge's antipathy toward the availability of abortion and that he had been appointing a similarly inclined lawyer in the hope of discouraging young women from going ahead with the petition. Such a course of conduct would not only be a seriously lawless act of oppression of the petitioner, it would also be an imposition on a conscientious attorney who wished neither to assist a minor to obtain an abortion nor, by intruding himself or herself into the minor's life, to misuse an attorney's power over her to discourage her from it. Indeed, it is not beyond the bounds of plausible speculation that the inquiry was a means of affording a truly conscientious attorney a way out of a moral Hobson's choice.

person's access to the legal system and the options that it affords.¹¹⁰ Indeed, if in a particular case or class of cases, there were a specific basis to conclude that no alternative was feasibly available, it might be proper for a court to override even a strongly based desire to refuse to represent a client on moral grounds. Model Code's Ethical Consideration 2-29 and its application here, however, go much further, and reflect an a priori dismissal that I find impossible to justify, exactly because of our societal commitment to religious pluralism.¹¹¹

None of this in any way requires or suggests endorsement of the inquiring attorney's moral stance. Indeed, I deem it important to say that I find a serious moral failing in the rigor of the attorney's position, refusing "under any circumstances" to assist a woman to obtain an abortion allowed by law.¹¹² The moral obligation to respond, if one can, to the compelling need of another has deep religious grounding, and one need not regard abortion as morally unproblematic to believe that, in some circumstances, morality might *oblige* an attorney to represent one in urgent need of legal counsel in order to obtain an abortion.¹¹³

B. *The Religious Lawyer's Stance Toward His or Her Client*

By undertaking, whether happily or otherwise, to represent a client, a lawyer accepts responsibilities that go beyond those owed to one seeking counsel. A person engaged as client is in the power of his or her lawyer, in a way that is not true of one only hoping to be so engaged. Accordingly, one may want the norms of the profession to leave attorneys significantly more free to be excused from taking on a representation than to decide how to carry it out.

110. The literature has many excellent expositions of the idea that a rejection of complete role-differentiation does not entail a complete effacing of a role-based distinction between a lawyer's and a client's moral position. For one example, see Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 73-81 (1980).

111. The ill-fated Religious Freedom Restoration Act sought to prohibit "government" from "substantially burden[ing] a person's exercise of religion" unless it meets the burden of showing that "application of the burden to the person . . . is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (1995). (For the significance of the italicized phrase to the permissibility of denying exemptions from legitimate general obligations, see Laycock & Thomas, *supra* note 52, at 222). "Government" was defined to include any "department, agency, [or] instrumentality" of a State or state subdivision, 42 U.S.C. § 2000bb-2(1), and presumably would have applied to the professional codes promulgated and enforced by or under the authority of a State's highest court.

112. Formal Op. 96-F-140, *supra* note 1.

113. The most pertinent proof-text, for me, is *Leviticus* 19:16: "You shall not stand idly by the blood of your neighbor." *Id.* For a discussion of the significance of this passage, see Ben Zion Eliash, *To Leave or Not to Leave: The Good Samaritan in Jewish Law*, 38 St. Louis U. L.J. 619 (1994). The classic application is, of course, Jesus' Parable of the Good Samaritan, *Luke* 10:25-37.

A strong version of this distinction would assert that, once counsel has signed on to the representation, there should be no room for modulating its execution in light of his or her religious scruples. One basis of such a response is the desire to avoid variousness and unpredictability in what clients find when they consult counsel. Apart from the fact that the result can hardly be otherwise,¹¹⁴ a focus on the pluralist quality of our society seems singularly oriented toward giving such a concern lessened weight. A pluralist society celebrates variousness, and the fidelity to personal commitment that makes it real. We are diverse in our views about the morality of abortion and state-imposed restrictions on abortion, and about the appropriate role of personal morality on our working-life choices, no less than in our religious rituals and metaphysical avowals.

The specific question posed by our inquiring Tennessean was fairly modest. He did not suggest that he wanted to advise his client to consider the morality of an abortion. His question was whether he might advise her about "alternatives" or to speak with her parents "about the potential abortion." The Board found that even those actions would be improper. First, the Board said that, "[i]f the minor is truly mature and well-informed enough to go forward and make the decision on her own," it "could possibly implicate a lack of zealous representation" for counsel to show "hesitation" or to advise "the client to consult with others." Second, the Board held that, for counsel "strongly" to recommend that his client discuss the abortion with her parents "or with other individuals or entities which are known to oppose such a choice" would run afoul of the admonition that counsel not allow "any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment."¹¹⁵

The predicate of the Board's reference to the client's maturity and information was probably the fact that, under the Tennessee law, a mature and well-informed minor is legally entitled to the waiver that she seeks.¹¹⁶ Yet surely the Board would not say that a client who meets a lawyer asserting clearly what he or she seeks in the representation should not be given any other information than—assuming it is the case—"the law is clearly on our side, let's go for it." To "represent" a client allows more to, because it requires more of, an attorney. Recall here the wisdom and pertinence of the late Professor Warren Lehman's insight:

The client may say, to take an obvious example, "I want a divorce." That goal of the client is a result, usually of his feeling trapped, hurt, and hopeless of any other way of coming to terms with his wife. It is not in any profound sense what he wants. If a lawyer could magi-

114. For a careful discussion, see David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 484-96 (1990).

115. Formal Op. 96-F-140, *supra* note 1.

116. See *supra* note 5.

cally return that marriage to a happy state, we should certainly call him a fool or worse if he were to bypass that opportunity on the ground that the client, having said, "I want a divorce," had defined beyond question the scope of the lawyer's obligation. . . .

. . . We say we want justice when we want love. We say we were treated illegally when we hurt. We insist upon our rights when we have been snubbed or cut. We want money when we feel impotent. We are likely to act most sure of ourselves when most desperately we want a simple, human response. If this is true, the lawyer presenting himself as an uncritical mirror is not a satisfaction but a disappointment. The lawyer is in the deeper sense *not* then doing what the client wants.¹¹⁷

Of course, a lawyer must tread very carefully, with great self-restraint and respect for the minor's multiply vulnerable state in exploring options other than that one which has triggered the representational encounter. But should the lawyer assume that the client knows of, and has soberly set aside, such "alternatives" as do exist? A minor may know that her parents will not consent to an abortion, or may not want them to know that she is pregnant (whether they would consent or not), but must the lawyer not even explore the question whether she would prefer it if, with counsel's aid, she were to become able to find a way to turn to them?

Many will answer these questions in the negative, on the specific ground that an older, male lawyer who believes strongly that abortion, even if legally available, is not a licit moral choice is singularly unlikely to prove able and willing to carry off the counseling task that I envision. This is certainly a tenable response.¹¹⁸ Yet the Board's reasoning is abstract and wide-ranging, and reflects a bureaucratic and wooden sense of "counseling" and a failure even to inquire whether it is possible to avoid the hazard of imposition on the client only by embracing the polar stance of abdicating any real fidelity to a client's full desires and priorities.

Allegretti has spoken critically of the widespread inability of the prevalent professional norm "to envision a relationship between lawyers and clients in which one or the other is not in charge of and dominant over the other. . . . Either the lawyer is in charge of the relationship, or the lawyer abdicates personal moral agency and regards himself as the unthinking instrument of the client."¹¹⁹ Lehman's insight reminds us that, the more unthinking, the less effective, a lawyer may become, even as an instrument. The Model Code views the lawyer as a "wise counselor, experienced in . . . put[ting] in workable

117. Warren Lehman, *The Pursuit of a Client's Interest*, 77 Mich. L. Rev. 1078, 1080-81 (1979).

118. Note, though, that it supports the premise of the lawyer's effort to avoid the representation altogether.

119. Allegretti, *The Lawyer's Calling*, *supra* note 13, at 41, 45.

order the entangled affairs and interests of human beings.”¹²⁰ Whether a minor has an abortion or does not, whether she shares with her parents the truth about her sexual activity and her pregnancy or does not, her affairs will often be entangled. And what she is most in need of, in addition to help in obtaining an abortion, might be “wise counsel” that might aid her in bringing her life into “workable order.”¹²¹

Yet Allegretti's words suggest a further question, which our inquiring Tennessean did not raise: Would it have been improper for him to explore with his client the morality of her choice? The Model Code seems clearly oriented toward a negative answer.¹²² It is nevertheless surely a challenge to an attorney, presumed to be strongly disapproving of abortion, to carry out this task in an acceptable manner. We are speaking of what Shaffer felicitously terms “the unequal encounter of two moral persons.”¹²³ Yet, again, there is a critical difference between an admonition against broaching the subject because of a particularized judgment of its great risk and unlikely success, and the notion that “moral counseling” is inconsistent with “zealous representation.” The challenge to the attorney is to integrate strong conviction

120. Model Code, *supra* note 4, EC 7-8 n.18.

121. Aided (as so often I have been) by my daughter's “wise counsel,” I acknowledge that the limiting words, “often” and “might be,” must be borne in mind. There will be cases in which the minor's life is “entangled” and out of “workable order” *only* because she needs judicial approval and counsel's help in obtaining it. Her parents may be neglectful or abusive in any of innumerable ways, and it may be a wholly mature and fully considered decision to keep them at bay with respect to her sexuality and her pregnancy. In such cases, the admonitions in the next paragraph of the text about the manner and limits of the lawyer's counseling role are certainly applicable.

122. Recall the language of Ethical Consideration 7-8:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. . . . A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

Model Code, *supra* note 4, EC 7-8.

123. Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 Cath. U. L. Rev. 319, 319 (1987) [hereinafter Shaffer, *Legal Ethics*]. Elsewhere, Shaffer acknowledges the risks of “moral imperialism and self-deception,” which—even for a lawyer recognizing their presence and force—reinforce the risk of “imposition.” He recognizes the danger of overwhelming the integrity of the client, but believes that the risks are “worth it.” See Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, U. Ark. Little Rock L.J. 69, 83-84 (1995). Shaffer's fullest elaboration of the idea of moral discourse—in advocacy as well as counseling—is in his book, *On Being a Christian and a Lawyer* (1981).

tion¹²⁴ with a lively awareness that in a pluralist society even the strongest conviction is personal, and that the manner of counseling must reflect the realities of a client's vulnerabilities. For a religious lawyer simply to "testify" to the strength of his or her convictions would be a grievous wrong, for it would fail to address the client as a concrete human being and a moral agent.¹²⁵ The task is to seek to engage *the client's* moral agency, to invite him or her to reflection and perhaps to dialogue.¹²⁶

Among the multiple difficulties of doing that sensitively is the need to remain aware that dialogue ends at the client's option, not at the lawyer's success at persuasion, and that genuine dialogue presupposes that, as Allegretti puts it:

Perhaps the *lawyer* will change. Perhaps the lawyer's moral doubts will be dispelled as he listens to his client tell his story. Perhaps the lawyer will come to understand more fully what motivates his client, appreciate and accept the client's objectives, and choose to continue as the client's companion and lawyer.¹²⁷

124. It is important to recognize that we are not dealing here merely with the representation of a person who has committed what, in the lawyer's eyes, is a serious wrong, but with one who seeks the lawyer's aid in committing such a wrong. As Shaffer notes with respect to counseling commercial clients, "the moral issue that is raised here has less to do with frustrating retributive justice than with complicity. The question is whether a lawyer should lend his assistance to wrong that has yet to occur." Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 Ga. L. Rev. 1021, 1030 (1989).

125. Jeffrey Stout describes Martin Luther King's mastery in "modulating his use of biblical categories when addressing audiences outside of the black church," so as to "invoke religious language, when appropriate, without *presupposing* a full-fledged system of religious belief." Stout, *supra* note 101, at 331.

Professor Lynn Buzzard of the Christian Legal Society describes three outlooks for "Christians serving in politics or law." Buzzard, *supra* note 14, at 35. The first, which he terms "evangelistic," is "using the profession as beachhead for evangelism." *Id.* While perhaps harmless when practiced with a strong client, I believe that this mode is inappropriate in any case and no more legitimate than energetically soliciting clients to contribute to the lawyer's favorite charity. "Using" is the right word; it is using the client for the attorney's own purposes, and unless there is specific ground for perceiving an invitation, it is a misuse of the relationship. Practiced with a vulnerable client, it is a gross abuse of power and the moral equivalent of an assault and battery.

126. It is a serious failing for a lawyer to regard a true (non-impositional) sharing with the client of his or her moral insights as simply an option, to be picked up or not at the lawyer's unguided fancy. If honest reflection would prompt the belief that the task can be undertaken and carried out properly, I regard it as an abdication of responsibility for a lawyer not to make the attempt. On the source of the failing, see *infra* notes 129-30, 132 and accompanying text.

127. Allegretti, *The Lawyer's Calling*, *supra* note 13, at 46. See also Allegretti's comments in *Lawyers, Clients and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 Fordham L. Rev. 1101 (1998), and, to like effect, Thomas L. Shaffer, *Legal Ethics*, *supra* note 123, at 329 ("[M]oral advice is not good unless it is open to influence from the client; he who counsels his sister must be prepared to be counseled in turn. . . . This theology of the client argues against the legal ethics of rectitude, which has so often seemed to think of him as no damned good.").

Some will, of course, experience this possibility as a reminder that Satan is never far away. To me, it seems clear that, unless a lawyer can approach moral counseling from the stance I have described, he or she may not carry it on with a client at all. That problem supplies a client-oriented reason why such a lawyer should have been excused from undertaking the representation, but the fact that the lawyer has been pressed into reluctant service does not legitimate oppression of the client—most especially a minor in the circumstances postulated. The client remains a “thou” and not an “it.”¹²⁸

Ultimately, both poles—the legal system’s dismissal of a counseling element to the representation, and a lawyer’s imposition of his or her morality on the client—proceed from a similar narrow conception of the relationship between lawyer and client.¹²⁹ In my view, it is the religious tradition that most pertinently illuminates this failing. Rabbi Abraham Joshua Heschel has put the fundamental conditioning thought with characteristic power. Contrast with the responses of the Tennessee Board of Professional Responsibility what its inquiring attorney might have learned from these words:

To meet a human being is a major challenge to mind and heart. . . .

To meet a human being is an opportunity to sense the image of God, *the presence* of God. According to a rabbinical interpretation, the Lord said to Moses: “Wherever you see the trace of man there I stand before you. . . .”

When engaged in a conversation with a person of different religious commitment I discover that we disagree in matters sacred to us, does the image of God I face disappear? Does God cease to stand before me?¹³⁰

128. Shaffer, *Legal Ethics*, *supra* note 123, quotes Martin Buber, who famously originated the “I-Thou” imagery, for the insight that the objective reality of an interaction between a professional and a person seeking his or her aid “tragically” traps both parties in an unequal relationship. *Id.* at 319-20. He refers to a remarkable dialogue between Buber and the great therapist Carl Rogers, in which Buber insists that, no matter how much the doctor (lawyer?) attempts to work “on the same plane” as the patient (client?), the former seeks to look at the relationship from both sides, while the latter can do so only from his or her own. *See* Martin Buber, *The Knowledge of Man* 171-72 (Maurice Friedman & Ronald Gregor Smith trans., 1965). Therein lies the “tragic” condition: “Humanity, human will, human understanding, are not everything. There is some reality confronting us.” *Id.* at 172.

129. Jack Sammons has been developing an immensely thought-provoking attempt to articulate a very different conception, most fully (so far as I am aware) in his article cited above. *See* Sammons, *supra* note 10.

130. Abraham Joshua Heschel, *No Religion Is an Island*, in *No Religion is an Island: Abraham Joshua Heschel and Interreligious Dialogue* 7-8 (Harold Kasimow & Byron L. Sherwin eds., 1991).

Rodger Kamenetz recounts a beautiful Hasidic account to like effect: [B]efore every human being comes a retinue of angels, announcing, “Make way for an image of the Holy One, Blessed be He.” How rarely do we listen for those angels when we encounter another human being. How rarely do we see in another human being’s eyes an image of everything we hold most dear.

As Allegratti has written with respect to the attorney-client relation: Lawyers and clients "form a common moral community in which each has responsibilities to the other. Each affirms the other as one loved by God, unconditionally, and thus possessing unconditional value. Each is answerable to the other."¹³¹

The ways in which lawyer and client are "each answerable to the other" varies with the context, in the present case most especially the age and multiple vulnerabilities of the client and the fact that the lawyer has come into her life by order of the court. For both an individual lawyer and those articulating professional norms, the task of structuring, expressing, and carrying out that mutual accountability is a most difficult one. It is hardly a response to those difficulties, however, to sweep the problem aside out of a narrowly bureaucratic conception of the counseling function, and, in the process, to fail to grasp the opportunity that engaging with the difficulties provides for enriching the lawyer-client interaction and, with it, the lives of both parties to it.¹³²

C. *The Conscientious Scruples of the Non-Religious Lawyer*

How does the foregoing apply to the position of the lawyer whose scruples are properly characterized as secular, to the demands of what some term conscience in contrast to religion? Even if one abjures, as I have done, an "essential conditions" or a "definition-seeking" approach to the concept of religion, any concept that can be described has boundaries.¹³³ The boundary may be fuzzy, more like that between light and dark than between forenoon and afternoon, but there nonetheless lies a space beyond the fuzziness, and plainly in the "secular" area. Yet it seems obvious, in light of an awareness of the difficulties of distinguishing the religious from the secular, that the line between the two, however coherent and justifiable, does not mark a

Roger Kamenetz, *The Jew in the Lotus: A Poet's Rediscovery of Jewish Identity in Buddhist India* 233 (1994).

131. Allegratti, *The Lawyer's Calling*, *supra* note 13, at 45.

132. The potential for a genuinely relational counseling process (including its moral dimension) is impaired, in my judgment, by the culture of both law schools and law practice, in particular their obsessive focus on rights, obligations, and hierarchy of decisional authority, which leads to an insufficient attention to the process of interaction between lawyer and client. For a useful discussion of the need for "structures that create dialogue," see Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 Am. B. Found. Res. J. 1003, 1013. In my view, even clinical education, although emphasizing the counseling function, excessively tends to think of it as an exchange of information. Warren Lehman's essay, *supra* note 117, is a useful corrective.

133. See *supra* note 15 and accompanying text. For some additional attempts to give content to the term, see Judge Arlin Adams' influential concurring opinion in *Malnak v. Yogi*, 592 F.2d 197, 200-15 (3d Cir. 1979) (*per curiam*); Eisgruber & Sager, *supra* note 99, at 1291-97; and the brief summary of several others in Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* 984 (1996).

fundamental qualitative divide for purposes of shaping the norms of professional responsibility.

I have spoken of obligation, integration, and transcendence as the constituent qualities of a religious outlook. Much secular thinking partakes substantially of these qualities. For example, Professor Rodney Smith, seeking to define "conscience," which he means to go beyond "religion," turns to terms—an "impartial accuser" and a "pull toward rectitude"—that he finds helpful exactly because they "connote[] a sense of duty or obligation, as opposed to mere[] preference or choice."¹³⁴ Integration, too, is not a quality limited to religious expressions; the same "pull" that seems to compel from within likewise works against a compartmentalization of the ethical to "private" life.

I believe that it is the element of transcendence, the experience of awe, of the presence of the infinite, that most fully distinguishes the religious from the secular world. At a relatively abstract philosophical level, this dichotomy is plainly visible. The religious tradition regards an abiding openness to awe, to mystery, as a fundamental truth about reality, as an aspect of reality that is to be celebrated and embraced, not in place of clarity and transparency but along with them. A religious consciousness deems it important to ground our stance toward the world in a palpable sense of wonder. A secular morality tends to place more store by rationality as a guide to moral truth, and tends to view a significant dose of "radical amazement" as getting in the way of clear thinking. The secularist abides not in wonder but in doubt, wary of the attempt to integrate mystery into our efforts to understand the world. Mystery tends to be regarded as a problem to be overcome if possible, and the conclusion that it is not possible as a confession of weakness or defeat.¹³⁵

134. Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. Rev. 645, 678. Eisgruber & Sager, *supra* note 99, at 1268-69, articulate the meaning of "conscience" as a pull "toward doing the right thing."

135. The Christian theologian Sandra Schneiders describes the world view she terms "rationalism" in these terms:

the boundless confidence in the capacity of the human mind to know everything by means of the . . . scientific method, . . . the repudiation of mystery as a meaningful category, the justification of whatever destruction is necessary to extract the secrets of nature, . . . and the reduction of reality to what can be scientifically investigated . . .

Sandra M. Schneiders, *Contemporary Religious Life: Death or Transformation?*, 46 *Cross Currents* 510, 522 (1996-97).

The African-American Christian philosopher Cornel West writes critically of ethical traditions whose "preoccupation" with "improving the social circumstances under which people pursue love, revel in friendship, and confront death" has led them to be "silent about the existential meaning of death, suffering, love, and friendship." Cornel West, *The Ethical Dimensions of Marxist Thought* xxvii-xxviii (1991). "Social theory is not the same as existential wisdom," he maintains, and it is the existential issue that to West is critical. *Id.* As Richard Rubenstein observes, a "purely secular society": lacks a sense of the tragic. It has yet to know what even the most archaic religions comprehended: that all human projects are destined to falter and

It is important to recognize that there is nothing inherent in secularism, in particular in the rejection of theistic approaches, that requires the reduction of wonder to clarity, and even as a portrayal of secular philosophical stances, the foregoing picture may be overdrawn. A secular consciousness that hospitably incorporates a sense of awe and wonder has much in common with a similarly oriented religious consciousness. I have in mind in particular those who live their lives with a palpable awareness of the miraculous in ordinary family and other relationships marked by love and caring, of the need for humility and patience in day-to-day life, or of the recurrent and unexplainable availability of reservoirs of those qualities.¹³⁶

Beyond that, individuals have a complexity that resists neat classification. To which side of the divide, for example, shall we assign philosopher-classicist (now law professor) Martha Nussbaum? She speaks of "reverence and awe" for the norms of the moral law as means of committing ourselves to them, as means of deeming them obligations: "We picture them *as if* they stood outside of us, even though *in a sense* we are well aware that they stand within us."¹³⁷ She is moved by Kant's description of the "ever-increasing awe" with which he experiences "the starry sky above me and the moral law within me." It is not that the moral law "is external;" she reads Kant to deny that explicitly. Rather, "he regards its presence in himself with the same awe with which he views the heavens." To Nussbaum, by language of transcendence we "express our wish to be bound" by the moral law, "even when we wish to do otherwise."¹³⁸ I find the terms, secular and religious, both insufficient to capture her stance.¹³⁹

More fundamentally, it should be borne in mind that my effort has not been to define religion so much as to describe the qualities that characterize religious consciousness, as a predicate for considering what the stance of a pluralist society should be toward one whose re-

fail. For technical society, failure is an incident to be overcome by further effort facilitated by the replacement of older units of manpower with newer units. For the human person, failure is of the very essence.

Richard L. Rubenstein, *After Auschwitz: History, Theology, and Contemporary Judaism* 27 (2d ed. 1992).

136. I owe my recognition here of this variety of transcendence to Alice Lesnick.

137. Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 *Yale J.L. & Human.* 197, 212 (1994) (emphasis added).

138. *Id.*

139. Compare this with the justly famous essay by philosopher-mathematician Bertrand Russell, *A Free Man's Worship*, in *Selected Papers of Bertrand Russell* 1 (1927). Although its richness defies selective quotation, even a brief portion suggests its integration of deep religious skepticism and a pervading sense of awe. Our "true freedom," to Russell, lies in our "determination to worship only the God created by our own love of the good, to respect only the heaven which inspires the insight of our best moments." *Id.* at 6. He continues: "[F]or Man, condemned to-day to lose his dearest, to-morrow himself to pass through the gate of darkness, it remains only to cherish, ere yet the blow falls, the lofty thoughts that ennoble his little day; . . . to worship at the shrine that his own hands have built." *Id.* at 14.

fusal to obey particular norms is grounded in his or her religion. For such purposes, it seems obvious that the line between the religious and the secular cannot serve to mark off sharply protected from unprotected scruples. Speaking of the more specifically doctrinal realm, Chris Eisgruber and Larry Sager aptly observe that it is "inappropriate for the judiciary to parse among claimants on the basis of their metaphysics."¹⁴⁰ As one moves further onto plainly secular ground, the problems of determining sincerity and importance increase, and there probably needs to be a "shading off" toward lessened or wholly withheld protection. The subject has attracted recent scholarly attention, but it seems premature to attempt here to work the problem more fully through here as it applies to lawyers.¹⁴¹

CONCLUSION

Although I have found it useful to use the question of aiding a minor to obtain an abortion as the context for examining the interaction between a religious lawyer and a pluralist society, it would be a serious evasion of the problem to forget how uncommon a context that is. Let me turn, one last time, to Shaffer, who quickly provides some soberingly reorienting examples of the problem closer to its core:

The commercial employer . . . who needs lawyers to help him figure out how to pay less than the minimum wage, or how to avoid his employees' legal right to organize and bargain collectively—have a union—and not get caught at it; or who, having evaded the law on wages or unions, wants to avoid punishment. The polluter who has undoubtedly polluted but who would like his lawyer to show him how to hold the public authorities at bay until he can make another year or two of profit¹⁴²

140. Eisgruber & Sager, *supra* note 99, at 1292. It is worth noting that this view has substantial constitutional support. See, for example, Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. 333, 344 (1970). As Kent Greenawalt observes: "It can be asserted both that the Free Exercise Clause demands an exemption for one class of persons and that the Establishment Clause then requires its extension to another class" Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 Sup. Ct. Rev. 31, 43.

141. Acknowledging that "[e]fforts to create a definition of 'conscience' that is sufficiently restrictive to be viable and, at the same time, capable of protecting actual matters of conscience are challenging," Smith, *supra* note 134, at 681, Professor Smith takes up the challenge, presenting a case for protecting non-religious scruples that seeks to give the concept discernible contours, *id.* at 669-86. His discussion describes and responds to some skeptical academic analyses of the question by Michael McConnell and Jesse Choper among others.

142. Shaffer, *supra* note 124, at 1030. Shaffer also uses the example of a corporate executive rather than a lawyer:

The law directs the corporate manager to an immoral course of action. She is called ["out of the church"] to be a trustee for those whose labor has produced the wealth she manages. Some of these are employees, some customers; some live in the communities where the business operates, and some have invested their money in the business. A trustee is faithful to all of her beneficiaries. To prefer one and neglect the others is to betray her trust.

It is in such cases that Shaffer defines the moral problem (just as our inquiring Tennessean did) not as defending the guilty but as “complicity.”¹⁴³ A lawyer’s religion may speak to his or her participation in such matters as plainly as the question of aiding in abortion does to many Catholic lawyers. Examples abound, but I find special salience in the breadth and power of the lesson that Seth Kreimer (speaking to a group of Jewish law students) drew from the biblical story of Esther:

Esther, in part through her own virtues, in part through luck, found herself in a position of great potential power. You as law students, in part through your own virtues, and in part through luck, likewise find yourselves in positions of great potential power. For make no mistake, lawyers are in many ways the royalty of American society: Upon your graduation, you will be in a position to hold lives and fortunes in your hands. And, whichever road you take, to corporate law, to public service, to domestic relations there will come a time when an opportunity will present itself, at some sacrifice or risk to yourself to use your power to mend the world.

At that time, you might wish to say to yourself what was said to Esther: “Who knows whether you were not brought into royal estate for just such a time as this?”¹⁴⁴

Over two centuries ago, Jonathan Mayhew described people as not only “naturally endowed with faculties proper for the discerning of these differences” between right and wrong, but as “under [an] obligation to exert these faculties.”¹⁴⁵ Yet the norms of the profession raise what Julian Wright felicitously terms the lawyer’s “adversarial shield” to wall off the teaching of one’s faith tradition.¹⁴⁶ A palpable, yet relatively rare harm is in those cases where an individual lawyer, like our inquiring Tennessean, finds the shield too porous to do its work. More serious, in my judgment, are those countless cases in which lawyers and law students—for the process is grievously powerful from the earliest days of a student’s legal education—have been successfully socialized, whether happily or reluctantly, not to look past the shield. A pluralist society, committed to valuing freedom of conscience, should lower the shield. It should not stand between a person and her God.

Shaffer, *supra* note 77, at 46-47.

143. See *supra* note 124.

144. Kreimer, *supra* note 70, at 11. The quoted passage is *Esther* 4:14, by which Mordecai persuades Esther to seek, at great personal risk, the King’s ear, “to make supplication to him and entreat him for her people,” *Esther* 4:8, threatened by Haman’s genocidal intentions.

145. See Underkuffler-Freund, *supra* note 100, at 895 (quoting Mayhew).

146. See Julian H. Wright, Jr., *Beware of the Adversarial Shield: Possible Roles for Christian Ethics in Legal Ethics*, 23 Memphis S. L. Rev. 573, 574-78 (1993).

Notes & Observations